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From: <deborah.hoag@readingpa.org>

To: John Lovell/R3/USEPA/US@EPA

Copy To: <jackie.hendricks@readingpa.org>

Delivered Date: 05/11/2011 04:17 PM EDT

Subject: RE: Consent Order and Agreement

ATTACHMENT: Consent Agreement Redline 5-10-2011.doc
John,

Thanks for your timely email reply. You provided some good examples on places where we had issue and others we had not contemplated. We had a good conversation with DFA and just received an edited COA which appears to address the issues we had. Jackie will be reviewing again as well and I have attached the redline version that compares to the original we sent to them. Feel free to review and comment. It is our intention to execute this on or before May 20th. Thanks for all your help.

Deb

Deborah A.S. Hoag, P.E.
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-----Original Message-----
From: Lovell.John@epamail.epa.gov [mailto:Lovell.John@epamail.epa.gov]
Sent: Monday, May 09, 2011 12:03 PM
To: Deborah A. Hoag
Cc: Jackie C. Hendricks
Subject: Re: Consent Order and Agreement

Here are my thoughts. As I mentioned in my previous e-mail, I'm also sending it to our enforcement guys and asking that they take a look at it as well since they have more experience with these things.

- I'm not really bothered by saying that you allege that the violations occurred and not that they did occur. I think that probably just gets back to the whole "without admission of guilt" thing. I'd say that the schedule and penalties are the more important issue. If you're looking for something more than "alleges", another way of getting the violations into the consent agreement might be to include an attachment with the violations listed and have something that says the City has cited DFA

for exceedance of its permit limits as shown in attachment A, or the City has identified the exceedances shown in attachment A (or something similar).

- In terms of the schedule for construction and compliance, I'm concerned about their use of the "is scheduled to" language also. The bottom line is that the consent agreement has to have a schedule that is enforceable. I'm not sure if their issue is with the "warrants and represents" language or if they are just trying to make the language fuzzier. It seems to me that the most straight forward way of doing this would be to simply say "activity A shall be completed by date". So for example, paragraph 6 could say "Construction of the building into which the pretreatment system will be placed will be completed by June 30, 2011."

- I'm not completely sure what the implications of their proposed changes to paragraph 14 are. I see that they are specifying daily maximum limits and 100 mg/l rather than the permit limit (is the permit limit different than 100 mg/l?). I've seen consent agreements that include interim limits where there are penalties imposed for exceedances of a higher "limit" during the course of the consent agreement. I think the purpose is to try to ensure that they do their best, but at the same time recognize that they may not be able to fully comply while the treatment system is being built. To some extent it may depend on the up front penalty amount and what that is intended to cover. If the up front penalty is determined assuming that they will be in violation throughout the life of the agreement, then it might be appropriate to give them a break on the stipulated penalties for "routine" violations. If the up front penalty did not cover ongoing violations and they want a break on the stipulated penalties, then it might be appropriate to increase the up front penalty.

- I'm also concerned about the fine schedule language. It seems to me that all their proposed language does is limit your ability to collect penalties (your ordinance says that you "may" collect higher penalties). I think the language should make payment of the stipulated penalties automatic. If they have a violation of the agreement, they pay a certain amount. Basically, you're limiting the amount that you will collect in exchange for them paying automatically and not appealing the fines.

- As far as the force majeure, I think it's not that unusual to have something that addresses violations caused by things beyond the control of the company. I'm not that familiar with what typical language would look like, but one thing I might suggest is that the notification occur when the company becomes aware of an incident that might cause a delay rather than wait until they know that it will cause a delay.

- One other thing that struck me is that the language that they added at the end of paragraph 13 seems very broad. What happens if you find out later on that they have data they didn't give you, or were falsifying some of the data, or tampering with the sampling equipment or some equally significant issue that you had not addressed. If you are going to leave language like that in there, my tendency would be to have it

say that they had paid their penalties (assuming that they have) for all cited violations, or to tie it to a list of violations that you attach to the agreement.

- I'm also a little concerned about the termination of the agreement. What happens if they decide that they prefer living under the terms of the agreement rather than under the "normal" enforcement program. Could they purposely fail to comply with their limits in order to take advantage of limited penalties? It may be appropriate for the penalties to increase significantly after the final compliance date (adjusted by any force majeure change).

John Lovell
Pretreatment Coordinator
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John,

Previously, we had discussed two food industries that were going through the formal planning process in the host municipality prior to the installation of industrial pretreatment systems. Since one had previously had a Consent Order and Agreement (COA) with the City and continues to be in SNC for the same issues, we were not inclined to offer any benefits normally afforded an industry with compliance issues being addressed.

However, with the other industry who is not in SNC we discussed the COA concept and they wanted to wait until they were at a point where they felt they had more control over the timing. Now that they have the municipal zoning and planning issues addressed and have all the municipal approvals in place, we issued a COA based on the schedule they had provided which we felt was reasonable. We have now received from them a redlined or track changes version that seems to have completely lost the intent of achieving compliance with an enforceable compliance schedule. We are not inclined to agree to the bulk of the changes as we don't think it would still meet your intent. I have attached the original we sent and what we received for your cursory review. Below are the key comments from Jackie's email following her side-by-side review of the documents.

I just finished my notes on the DFA revision to the COA. These are just my major concerns in the revisions.

- Use of the term alleges in various statements
- Use of "is scheduled" which replaces "will be completed" on points 6 through 10
- Multiple changes to the intent of the fine schedule in point 14
- Use of "may" in the imposition of penalties in point 14 and 15

· The force majeure which is actually covered in point 22

As we discussed, this no longer is a Consent Order with an enforceable compliance schedule. These points cannot be changed.

Please let me know if you have difficulty opening what they sent to us. We would like your opinion on the original and changes as proposed. Thanks.

Deb

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[attachment "COA CoR-Dairy Farmers of America.DOC" deleted by John Lovell/R3/USEPA/US] [attachment "Consent Agreement between City of Reading DFA (Legal redline)(ALW-2) 2011-04-22.docx" deleted by John Lovell/R3/USEPA/US]

- Consent Agreement Redline 5-10-2011.doc